

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 25

In the Matter of	*	
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	*	
GLOBE INDUSTRIES, LLC	*	
	*	
Respondent,	*	
	*	
and	*	Charge Nos. 25-CA-209034
	*	25-CA-209055
	*	25-CA-209095
	*	25-CA-209100
INDIANA PIPE TRADES ASSOCIATION	*	
AND U.A. LOCAL 502, AFL-CIO	*	
	*	
Charging Party.	*	
	*	

BRIEF FOR RESPONDENT

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I. STATEMENT OF THE CASE

This matter involves four unfair labor practice charges, Charge Nos. 25-CA-209034, 25-CA-209055, 25-CA-209095 and 25-CA-209100, wherein the Indiana State Pipe Trades Association (“ISPTA”) and U.A. Local 502, AFL-CIO (collectively the “Union”) allege that Globe Industries, LLC (hereafter “Globe” or “the Company”), through its supervisors or agents, engaged in the following conduct in violation of 29 U.S.C. § 185 of the National Labor Relations Act (“Act”):

1) Case No. 25-CA-209034: On or about October 27, 2017, Globe violated the protected Section 7 rights of Ralph Davis (“Davis”) by terminating his employment because he engaged in activities on behalf of the Union;

2) Case No. 25-CA-209055: On October 27, 2017, Globe violated the protected Section 7 rights of Dale Robbins (“Robbins”) by terminating his employment because he engaged in activities on behalf of the Union;

3) Case No. 25-CA-209095: On October 20, 2017, Globe violated the protected Section 7 rights of Nathan Adams (“Adams”) by terminating his employment because he engaged in activities on behalf of the Union; and

4) Case No. 25-CA-209100: Globe violated the protected Section 7 rights of its employees by Benjamin Hunley (“Hunley”), Fabrication Shop Foreman, when he implied to various employees that the fabrication operations of Globe would be shut down if a union were to be brought into the plant.

After a period of investigation, Region 25 of the National Labor Relations Board (“NLRB”) issued an ORDER CONSOLIDATING CASES, CONSOLIDATED COMPLAINT

AND NOTICE OF HEARING against Globe. In the Consolidated Complaint, it was asserted that the allegations in Charge Nos. 25-CA-209034, 25-CA-209055, 25-CA-209095 and 25-CA-209100 violated Section 7 and Section 8(a)(1) and (3) of the Act 29 U.S.C. § 157 and 158 (a)(1) and (3). Globe filed a timely Answer on February 9, 2018.

An AMENDMENT TO CONSOLIDATED COMPLAINT was filed by Region 25 on February 23, 2018, alleging that Davis and Robbins were required by Respondent Globe to submit to a drug test in violation of Section 8(a)(1) and (3) of the Act. An Answer to the Amended Complaint was filed by Globe on February 28, 2018.

The AMENDED COMPLAINT was further amended at the hearing by motion of Counsel for the General Counsel alleging that in October 2017, at the Globe facility, Hunley threatened employees with plant closure if the employees selected the Union as their collective bargaining representative. No objection was made to the proposed amendment to the Consolidated Complaint and the Amended Complaint was so amended. (Tr., p. 279).

A hearing on the Consolidated Complaint was held before the Honorable Charles J. Muhl, Administrative Law Judge, on the consecutive days of Wednesday, March 7, 2018, Thursday, March 8, 2018, and Friday, March 9, 2018, at 90 N. Main St., Scottsburg, Indiana.

The issues presented to Judge Muhl were: (1) whether Davis, Adams and Robbins were discharged by Globe in violation of their protected rights under the Act; (2) whether Davis and Robbins were required to submit to a drug test by Globe in violation of their protected rights under the Act; (3) whether Houston Andres unlawfully interrogated job applicants concerning their union membership, activities, and sympathies; (4) whether Ben Hunley unlawfully threatened employees that the Globe fabrication facility would shut down if the employees of

Globe selected the Union as their collective bargaining representative; (5) whether Sherry Cress unlawfully informed job applicants that Globe did not hire union applicants; and (6) whether Sherry Cress is an agent of Globe under the provisions of Section 2(13) of the Act, 29 U.S.C. § 152. The testimony and documentary evidence presented during the three days of hearing support a finding in favor of Globe on each of these issues. Therefore, we respectfully submit that Charge Nos. 25-CA-25-CA-209034, 25-CA-209055, 25-CA-209095 and 25-CA-209100 should be dismissed in their entirety.

II. STATEMENT OF FACTS

A. Company Background

Globe is a manufacturing facility located in Pekin, Indiana. The Company fabricates pipe for use primarily in the petrochemical industry. The Company cuts, fits, welds, tests, paints and ships steel pipe. Approximately, thirty employees are employed by Globe at its Pekin facility, twenty-two of whom currently are employed in the Company's fabrication/production operations. (Tr., pp. 105-106, 323).

Houston Andres (hereafter "Andres") is the Director of Operations for Globe. He has been employed by the Company since 2015, and has held his current position since mid-February 2017. Andres oversees all fabrication, painting, hydro testing, shipping and receiving operations performed at the Pekin facility. In the Globe fabrication operations, the twenty-two employees are distributed throughout the Globe production operations. Nine employees are assigned to the Painting Department¹. Three employees handle shipping and receiving tasks. One employee is responsible for the Globe Hydro Department. Globe currently employs seven

¹ The Painting Operation is a separate corporation, Globe Industrial, and is not part of Globe. (Tr., p. 337).

Welders and two Pipe Fitters, or “Fitters”. A Fitter is an individual who “tack welds” pieces of pipe together from a customer schematic “blueprint” prepared for each Fabrication Shop project. A Welder will produce the complete weld to permanently hold the tacked pipe pieces together, as assembled by the Fitter. All production/fabrication employees report to Hunley. (Tr., pp. 106-108).

Andres is a former Globe Welder and was certified by Globe in all of its welding processes, as are all Globe Welders and Fitters. As Andres explained, there are three types of welding processes used within the Globe Fabrication Shop. Those processes are: Tungsten Inert Gas (“TIG”); Metal Inert Gas (“MIG”); and Flux-cored ARC Welding (“FCAW”). TIG welding is a manual process which uses a welding rod to produce the weld. MIG and FCAW are characterized as semi-automatic processes, each of which uses a continuously feeding welding wire to produce the weld. The continuous feeding welding wire is the principal difference between manual welding and semi-automatic welding. (Tr., pp. 325-327).

Semi-automatic welding processes are more accurate and considerably faster than manual welding. From a quality standpoint, the semi-automatic processes are more reliable than manual welding. As both Andres and Hunley testified, in the Globe Fabrication Shop approximately seventy percent (70%) to eighty percent (80%) of all the welds produced by the Company require the semi-automatic MIG process. TIG welding is principally used on small-bore pipes having a diameter of 2½ inches or less. TIG welding is also used for socket welds. All pipes of 3 inches or greater diameter require the MIG welding process. (Tr., pp. 106-108, 324-328).

Introduced and received into evidence as Respondent Exhibit 1 is an aerial schematic of the Globe operations in Pekin, Indiana. Andres testified that material for customer orders is received in the Company's receiving area and checked in. This is to ensure that the material received matches the purchase orders for the material. The received pieces also are inspected for damage, as well as any other defects, while in the receiving area. The received and accepted material then is allocated to the particular customer order which generated the material purchases. The receiving building is identified in the lower right center of Respondent Exhibit 1. (Tr., pp. 323-324, 332).

Once the material has been segregated for each specific customer order, a package or "spool," as it was referred to during the hearing, for the project is issued to the Fabrication Shop. A spool is a completed isometric drawing of the pipe to be assembled. A material list is part of that spool. The materials are assembled by the persons in the bay² working on the spool and placed on pallets. The fittings for the assembled pieces are taken to the Paint Shop to be cleaned, blasted and painted. (Tr., pp. 323-324, 330-332, 527-528, 543).

When all of the welds have been made on the spool it is sent to an employee, "the Checkout", for visual confirmation of the proper orientation of the component pieces, the use of conforming materials identified on the schematic, and the integrity of the welds. When the Checkout has completed his inspection and confirmed compliance of the completed package with the schematic, it is routed to x-ray. The Checkout also will note, as part of the inspection,

² The Fabrication area is divided into three bays. North Bay, Middle Bay and South Bay. Only the North Bay and the Middle Bay are staffed with Welders and Fitters and other personnel where the production work is completed. The Fabrication Shop has a ground level conveyor that runs the length of the Fabrication building, which is used to move the pieces for the customer from one production area to another. It is from the conveyor belt that the pieces of the package are taken, tack welded and welded, and then moved down the line for further processing. (Tr., pp. 339-340).

the individual Welder(s) who produced welds on the finished package. Hunley participates in the inspection of the finished spools along with the Checkout.³ Identification of Welders working on a spool is made possible because each weld is stamped with the Welder's stencil⁴ by the Welder who produced the weld. (Tr., pp. 330-331, 340, 414, 527-529, 571).

If the Checkout discovers an inconsistency between the completed package and the schematic for that package, or finds a defective weld on the completed package, that part of the package is rejected. If a weld is rejected, the rejected piece is returned to the Welder who completed the work, and the work will be redone by that Welder. If the work is rejected a second time, the entire piece where the defective weld was found is cut out of the assembled pipe and the piece will be returned to its initial stage of the fabrication process and re-processed. Once the completed piece has been approved by the Checkout, the completed package is routed to x-ray for radiographic testing ("RT"). (Tr., pp. 330-331, 543).

Packages or spools may be required to have a 100 percent of the welds x-rayed or some percentage less than 100 percent. The choice of the percentage of welds to be x-rayed is up to the customer, but ranges from 30 percent to 100 percent. If the package calls for less than 100 percent inspection then, in that event, at least one welded piece per Welder working on that package is inspected and the remaining percentage of the pieces to be inspected are selected randomly by the x-ray provider Hartford Quality Assurance (hereafter "Hartford"). A written

³ Hunley was initially hired as a Checkout when he joined Globe. Subsequently, he was promoted to Fabrication Shop Foreman. (Tr., pp. 568-569).

⁴ Each stencil number used in the Globe manufacturing process is unique to a single Globe Welder. A Welder's stencil is active if the Welder is working currently for the Company. If the Welder is inactive, that is, not working for the Company, the stencil number will be inactive until the Welder returns to active service. If a Welder leaves the employ of the Company permanently, that Welder's stencil number is retired and is never reactivated by assignment to a different Globe Welder. (Tr., pp. 482-483).

report of each x-ray made by Hartford will be prepared for the customer for that package. (Tr., pp. 187-188, 330-333).

In performing the x-rays, Hartford compares the weld to the welding code requirements of the American Society of Mechanical Engineers (“ASME”) and tested against the applicable ASME standards. Any non-conforming weld is rejected and the piece returned to the Welder for appropriate repairs. (Tr., pp. 329-330).

When the completed piece has satisfactorily passed Hartford’s x-ray examination, it may be moved to either the Hydro Department, if hydrostatic water pressure testing is required by the customer, or it will be moved to the Paint Department, if painting is required on the piece. If neither is required, the piece is prepared for delivery to the customer and shipped. (Tr., p. 334).

If the completed piece is scheduled for testing in the Hydro Department, it is pressure tested with water to customer-required specifications. Such water pressure could be as high as 10,000 psi. If a leak is discovered during that process, the non-conforming piece is routed back to fabrication for the Welder responsible for the defective weld to begin the welding process anew. When the package has been completed to customer and ASME code specifications, it is packaged and shipped to the customer. (Tr., pp. 334-335).

B. Globe Handbook and Drug Policy

Globe has a published Handbook that it provides to all its employees. Within the Handbook, on pages 9 and 10, there is a drug policy that details Globe’s position on drug use by employees and sets forth penalties for violations of the policy (“Drug Policy”). The policy also contains parameters for testing specimens for the presence of prohibited substances. Further, the

Drug Policy mandates that “all testing will be performed at a NIDA certified laboratory”. The Drug Policy further provides for “reasonable cause” testing and “post-accident” testing. The reasonable cause testing language in the Drug Policy reads as follows:

IV. Reasonable cause

If possible, two (2) or more supervisors (client representatives) will make the determination as to when there is reasonable cause to test.

Globe also published the Drug Policy in a stand-alone policy format that is given to each new Globe employee at the time of employment, for which, the employee executes a receipt. New Globe employees also receive and acknowledge receipt and knowledge of the Globe Handbook. The receipt for the stand-alone copy of the Drug Policy reads as follows:

This is to certify that I have received and read the Globe Industries, LLC Company Drug Policy and that I will follow these Instructions while employed by Globe Industries, LLC.

The Handbook receipt is styled “**Acknowledgment of Receipt of Employee Handbook and Agreement to Conditions of Employment.**” The Acknowledgment is found on page 21 of the Handbook and contains the following language:

I have read and understand the contents of this handbook. I agree to abide by the conditions specified in the handbook and understand that these conditions can be changed by Globe at its sole discretion without notice, at any time.

Employee Name: _____

Employee Signature: _____

Date Signed: _____

This page should be signed after you have read and understand the handbook. This page should then be returned to your supervisor as it will stay in your file for documentation of your employee records. The handbook will be provided to each employee for their records.

(Tr., pp. 266-269, 442, 472-473, 533; Respondent Exhibit 3).

Each alleged discriminatee executed a receipt for the Drug Policy and for the Handbook. The receipt for the stand-alone copy of the Drug Policy was executed by Robbins on October 9, 2017, and received into evidence as Respondent Exhibit 3. The receipt for the stand-alone copy of the Drug Policy was executed by Davis on January 13, 2016, and received into evidence as Respondent Exhibit 4. The receipt for the stand-alone copy of the Drug Policy was executed by Grainger on March 18, 2015, and received into evidence as Respondent Exhibit 5. (Tr., pp. 269 and 306; Respondent Exhibit 3 and 4).

The Acknowledgment for receipt of the Employee Handbook was executed by Robbins on October 9, 2017, and received into evidence as Respondent Exhibit 8. The Acknowledgment for receipt of the Employee Handbook was executed by Davis on February 16, 2017, and received into evidence as Respondent Exhibit 9. The Acknowledgment for receipt of the Employee Handbook was executed by Adams on July 31, 2017. (Tr., pp. 269 and 306; Respondent Exhibits 8 and 9).

In addition to executing the receipt for the Policy on Drugs, both Davis and Robbins also executed a **GLOBE INDUSTRIES, LLC COMPANY SAFETY POLICY** ("Safety Policy"). The Safety Policy was executed by Davis on January 13, 2016. The receipt was entered into evidence as Respondent Exhibit 6. The Company Safety Policy was executed by Robbins on October 9, 2017. The receipt was entered into evidence as Respondent Exhibit 7. That policy makes the following reference to drug use:

NO employee shall report to work under the influence of alcohol or mind altering substances. The use or possession of these substances while on the job shall result in disciplinary action. (See Policy on Drugs).

(Tr., p. 269; Respondent Exhibits 6 and 7).

C. Chronology of Union Organizing Effort

As shown on Respondent Exhibit 1, the Globe manufacturing facilities are located at 242 S. Voyles Road, Pekin, Indiana. That aerial photograph illustrates the orientation of the Receiving Facility, Fabrication Shop, X-ray Department, Maintenance Department, Paint Shop and Hydro Facility as being on the opposite side of Voyles Road from the employee parking lot and the Globe office. There is a large area behind the Fabrication Shop and the Paint Shop where finished pipe and unfinished pipe are stored while waiting either for shipment of the finished pipe to Globe customers or waiting on further fabrication for the stored unfinished pipe. The office trailer, located adjacent to the employee parking area, includes an office for Andres, a table desk for Marlin Andres, Chief Executive Officer and owner of the Globe operations, a visitor reception area and work area for Sherry Cress, the Globe Office Manager, and a small office for the Globe pipe vendor, who orders pipe and maintains the pipe yard identified in the upper right center of Respondent Exhibit 1. (Tr., pp. 107-108, 323; Respondent Exhibit 1).

On or about June 29, 2017, John Kurek (hereafter “Kurek”), Lead Organizer for the ISPTA, and Brian Mareno (hereafter “Mareno”), also an ISPTA Union Organizer, drove to the Globe facility during the employees’ lunch break, parked in the employee parking lot and began distributing a one-page flyer, Respondent Exhibit 11 and General Counsel Exhibit 14, top page only, to employees returning from lunch. Kurek and Mareno placed the same flyer they were distributing to employees on the windshields of employee automobiles parked in the lot. It was Kurek’s testimony that no supervisors were present when this activity occurred. (Tr., pp. 57, 344-348; Respondent Exhibits 1 and 11, General Counsel Exhibit 14).

Andres, who was sitting in his office, saw Kurek and Mareno placing the handbills on employee automobile windshields and walked outside to introduce himself. The individuals met and exchanged introductions. Andres invited Kurek and Mareno to stay on Globe premises and continue their handbilling activity. Kurek and Mareno returned the following day and passed out the same flyer as they had the previous day. (Tr., pp. 58-59, 345-348).

Andres testified that the same two individuals returned to the Pekin facility approximately two months following their initial visit. On the second visit to Globe premises, Kurek and Mareno placed a union pamphlet, Respondent Exhibit 12, on Andres' windshield and on windshields of employee cars in the employee parking lot.⁵ The pamphlets were not distributed to Globe employees. Andres did not speak with Kurek and Mareno on the occasion of that visit. (Tr., pp. 351-353, 439; Respondent Exhibit 12).

It was the testimony of Kurek that on October 18, 2017, he and another union organizer, Sam Rouse, met with Adams, Davis, and Robbins at a restaurant in Scottsburg, Indiana to discuss the Union's interest in organizing the employees of Globe. He gave the three individuals contact cards and authorization cards. The contact card was to be used to obtain personal contact information of Globe employees for the Union. The authorization cards were to be used to enroll interested employees in the Union. The three employees who attended the meeting completed and signed union authorization cards. (Tr., p. 68).

⁵ Kurek testified that there was subsequent handbilling at the Globe premises but identified the date as July 13, 2017. He further stated that a third Organizer, David Barbati, was present with them to pass out handbills. He stated that no Globe supervisors were present when this handbilling occurred. (Tr., pp. 54-57).

Kurek stated that between their handbilling at Globe on July 13, 2017, and October 18, 2017, a three-month period of time, there was only limited contact with “some Globe employees” and that Rouse and Mareno had made “some house calls.” (Tr., pp. 65-67).

As of October 18, 2017, no effort had been made by Kurek, Mareno, or any Globe employee to obtain union authorization cards from a Globe employee, nor had any authorization cards or contact cards been distributed to Globe employees. Moreover, the Union had made no effort to advise Globe management which, if any, employees were involved in the Union’s organizing effort at Globe. It was Kurek’s testimony that the Union and the three employees who attended the meeting in Scottsburg on October 18, 2017 were trying to keep information regarding the Union’s organizing effort quiet and secretive from Globe management. The testimony of Andres and Hunley confirmed that the Union’s efforts to maintain secrecy of the Union organization drive and the Globe employees involved were wholly successful. (Tr., pp. 65-68, 86-87).

Kurek testified further that no Union authorization cards or contact cards were signed in the presence of a Company supervisor or official, and that he was only aware of three cards being signed, those being the cards signed at the meeting on October 18, 2017. Kurek also stated that no Globe employees participated in any conversation he had had with either Andres or Hunley. It was Kurek’s further testimony that no employees of Globe were ever asked by the Union to engage in handbilling at the Company’s property, and no employees of Globe ever engaged in any Union activity in the presence of Andres, Hunley, or any other Globe supervisor or agent. Kurek stated that none of the three employees who attended the October 18, 2017, meeting in Scottsburg were given Union paraphernalia, such as union stickers, buttons, insignia,

wearing apparel, or any other item that would identify them as being a Union supporter. (Tr., pp. 86-91).

Kurek next visited Globe premises and distributed a handbill to Globe employees on November 16, 2017. The handbill he distributed on that occasion was entered into evidence as General Counsel Exhibit 18. At the time of the distribution of that handbill, the three alleged discriminatees already had been discharged by Globe. The handbill also was placed on windshields of automobiles parked in the Globe employee parking lot. Union handbilling also occurred on November 20, 2017. The same handbill distributed to employees on November 16, 2017, was distributed on that occasion. On the morning of November 20, 2017, at about 9:00 a.m., Kurek spoke with Andres, who advised Kurek that future handbilling would have to be conducted off Globe premises. This was at the direction of Marlin Andres. Kurek was given a layout of the Globe property line. No Globe employees were present in the parking lot when this conversation occurred. No other handbills were distributed by the Union. (Tr., pp. 73-76; General Counsel Exhibits 13 and 18).

D. Union Activity of Alleged Discriminatees

As far as the union activities of Nathan Adams are concerned, Adams testified that he received the contact cards and the union authorization cards at the meeting with Kurek in Scottsburg on October 18, 2017. It was the first time he received the cards. He confirmed that no signed authorization cards were returned by him to Kurek. Adams also testified that he never told Andres or Hunley that he supported the Union or was soliciting Globe employees to support the Union. (Tr., pp. 190-192, 198-199).

Adams confirmed the testimony of Kurek that he tried to keep his union activities quiet from the Company and that he did not want Andres or Hunley to know he was active on behalf of the Union. In that regard, Adams stated that he never wore any stickers or clothing identifying him as a Union supporter. He went on to say that he was not aware of any other employee at Globe who demonstrated their support for the Union. His specific comment was:

No one was showing the Company that they supported the Union.

(Tr., pp. 198-199).

Similarly, Dale Robbins, who was hired by Globe on October 9, 2017, testified that he did not try to advertise his support of the Union to anyone, and only talked about the Union with people whom he thought supported it. After Robbins was hired, he immediately aligned himself with Davis, Adams, and Grainger and regularly went on breaks with those individuals. (Tr., pp. 218, 224-225).

Robbins attended the October 18, 2017, meeting⁶ with Kurek in Scottsburg. Robbins, like the other Globe employees in attendance, received the contact cards and authorization cards at the meeting. He claimed to have distributed them to Globe employees. After receiving contact cards and union authorization cards from Kurek and Rouse at the meeting in Scottsburg on October 18, 2017, Robbins distributed them to Globe employees. He received four authorization cards back from four employees. Those employees, however, almost immediately asked that their cards be returned. One was returned and the others were “thrown

⁶ Robbins identified the date of the Scottsburg meeting as October 6, 2017, in the affidavit he gave to the NLRB. That date actually preceded his employment with Globe by three days. He claimed to have brought the error to the attention of the Board Agent preparing the affidavit, but the Board agent allegedly refused to make the correction. (Tr., p. 247).

away.” No signed authorization cards were returned to Kurek by Robbins. (Tr. pp. 225-228, 243).

Robbins also claimed that he was given Union stickers by Kurek at the meeting on October 18, 2017. Robbins claimed to have worn the stickers on his welding helmet, and placed the stickers on his lunchbox, while he was employed by Globe. Robbins changed that testimony, however, to state that he put the Union stickers on his helmet **after** he was fired by Globe on October 27, 2017, but the stickers were on his lunchbox during his employment. That story also came unhinged when Robbins’ testimony was contradicted by his sworn affidavit wherein, he said:

I did not wear any stickers or anything showing my support for the
Union . . .

Robbins then added that he tried to keep his interest in the Union secret from Globe management and that he was not an employee of Globe long enough to do anything with the Union. (Tr., pp. 243, 251-258, 260, 273).

Ralph Davis, another alleged discriminatee, also testified that he was one of the members of the group who frequented the Pekin Sunoco for their daily breaks and lunch periods, along with Adams, Robbins, and Grainger. Davis would normally ride in the front passenger seat. He was familiar with the Company Drug Policy, Safety Policy and Handbook. (Tr., pp. 282, 289-290, 300-302).

Davis, like Robbins and Adams, did not identify himself as a union supporter. He never wore Union stickers, buttons, wearing apparel, or other insignia while employed at Globe. He did not identify himself to either Hunley or Andres as a Union organizer or advocate and he

made every effort to keep his participation in the Union secret. (Tr., pp. 292-293, 304-306; Respondent Exhibits 4, 6 and 9).

E. Substance Abuse Testing of Ralph Davis, Dale Robbins, and Rodney Grainger

The consistent testimony of Davis, Robbins, and Adams was that they regularly took their morning and afternoon breaks and lunch periods with Grainger. They typically would drive to the Pekin Sunoco gas station in Grainger's van for food and return to the plant at the end of the breaks.

It also was the consistent testimony of Davis, Robbins, and Adams that Hunley spent virtually all of his workday on the Fabrication Shop floor supervising production operations. Hunley agreed with that testimony and said that he visually inspected every piece of pipe produced at Globe, in addition to overseeing the actual production activities. Hunley also stated that Davis, Robbins, Adams, and Grainger routinely returned from their breaks and lunch periods smelling of marijuana. Hunley testified further that he was familiar with the smell of marijuana by virtue of his prior substance abuse problem; a habit from which he has been free since August 5, 2012. (Tr., pp. 569, 571, 584-586).

Hunley's concern with the use of marijuana by the employees was based on the heightened opportunity for workplace injuries to employees because of the heavy equipment, tools, and materials used in the Globe manufacturing processes. Hunley said employees needed to be on their "A" game when working on the Globe production floor. His concerns about drug use and injuries increased over time. In light of those concerns and the increased frequency of the presence of the marijuana odor, a report of the suspected marijuana use by Adams, Davis,

Robbins, and Grainger was made to Andres by Hunley. Andres said he would more closely monitor the problem. (Tr., p. 585).

The odor of marijuana was noticed by Hunley primarily at the employee break times and lunch periods. Those times were 9:00-9:15 a.m. (first break), 12:00-12:30 p.m. (lunch period) and 3:00-3:15 p.m. (second break). Hunley became more concerned about an escalating problem of drug use when he noticed that Adams and Robbins joined Grainger and Davis for breaks and lunch shortly after they were employed at Globe. Hunley even took the unprecedented step of telling the four employees that he could smell marijuana on them when they returned from breaks and lunch. However, nothing changed about their behavior. Hunley reported this behavior numerous times to Andres. (Tr., pp. 585-587).

Andres testified that the purpose of the Drug Policy was to keep employees safe. He identified the same concerns about drug impaired employees working around and using heavy equipment, overhead cranes, welders, grinders and potentially hazardous conditions which were a threat to other employees and a concern to Hunley. Andres opined that injuries could be sudden and serious. (Tr., pp. 422-423).

It was during the week of October 23, 2017,⁷ when Andres made the decision to have Davis, Robbins and Grainger tested under the policy's reasonable suspicion standard. Prior to this decision, only two employees had been tested under the Drug Policy. Both of those tests were the result of accidents on the job, and the employees were tested under the post-accident

⁷ In an affidavit given to the NLRB by Andres on December 8, 2017, he said he made his decision to drug test Davis, Robbins, and Grainger on October 20, 2017, when he saw Davis in Grainger's van at the Dollar General Store in Pekin, Indiana on October 20, 2017, and detected the odor of marijuana coming from Grainger's van. He was mistaken in his recollection of the event, however, and was able to confirm that it was October 23, 2017, when he made his determination to drug test the three individuals. (Tr., p. 424; Joint Stipulation).

provisions of the Drug Policy. One employee tested negative for drugs and returned to work. The second employee tested positive for drugs and was discharged. (Tr., p. 423).

Because Globe had not administered a reasonable cause drug test prior to the observation of Grainger's van and detection of the odor of marijuana on October 23, 2017, Andres sought advice on how he should approach the reasonable cause drug screening procedure. He first emailed Brian Kruer, a Globe Mechanical Officer, and Andres' cousin. He thereafter met with Kruer for his advice. Brian advised Andres to contact Smith & Smith Attorneys. Andres emailed Smith & Smith Attorneys on October 25, 2017, and spoke with W. Kevin Smith. Mr. Smith requested a copy of the Drug Policy and a copy of the Globe Employee Handbook. Following their conversation, Andres had the Globe drug screen protocols modified at the Norton Occupational Health Center to include reasonable cause testing. Andres then prepared Drug Test Refusal forms, anticipating that one or more of the individuals to be tested would refuse. At Mr. Smith's suggestion to have a witness present when the employees were being taken to the testing site, Andres selected Mike McCawley, the Checkout and Globe's first responder, to serve as a witness. McCawley was a non-supervisory employee. (Tr., pp. 151-155, 425-429; Respondent Exhibit 28).

Andres contacted Hunley around 9:00 a.m. on October 27, 2017, and asked that he and Mike McCawley come to his office. They were in the Fabrication Shop at the time. On the way to the office they passed Grainger's van which was parked by the Fabrication Shop. McCawley commented on a "strong odor" coming from the van and asked Hunley what it was. Hunley told him it was marijuana. They had just left the Fabrication Shop when they smelled the

odor. Hunley said McCawley was “shocked” when he learned the odor was marijuana. They then walked to the Globe Office to meet Andres. (Tr., pp. 440-442, 587-588).

Andres told McCawley and Hunley that Davis, Robbins, and Grainger would be the employees taken for the drug tests at the Norton Occupational Health Center. Hunley and McCawley walked back to the Fabrication Shop. Andres drove over so he could transport the individuals to the testing center. Andres brought the three individuals into the area where McCawley was waiting. (Hunley had left the area and returned to his work). Andres spoke to the three individuals and reminded them that the Drug Policy gave him the right to test for reasonable cause. (Andres noted in his testimony that on October 27, 2017, at that meeting each employee smelled of marijuana.) When told he was taking them to Norton Occupational Health Center, Grainger said he would not take the test because he would test positive. Davis said the same thing, that is, he would test positive. Robbins did not say anything. Robbins did, however, nod his head in agreement with the other two, that he, too, would test positive. All three individuals refused to go with Andres to the Norton Occupational Health Center to submit to drug testing. All three executed the Drug Test Refusal Form. Each form also was signed by Andres and witnessed and signed by McCawley. (Tr., pp. 146-148, 151-155, 429-437, 442-446, 470-474; Respondent Exhibits 19-21, 23).

The three employees were placed on suspension following their refusal to submit to the drug test. Thereafter, they were discharged and a Termination Report was prepared for each. The Termination Report was executed by Hunley and Andres. The explanation for the termination was identified as: “Refusal to submit to drug test.” Andres testified that the actual refusal to submit to the drug test was not determinative of his decision to terminate Davis,

Robbins and Grainger. Rather, it was the fact that on October 27, 2017, they each admitted they would fail the drug test if they took it. This was compounded by the fact that the individuals consistently had used marijuana at work, as reported by Hunley to Andres, and that Andres had personally smelled marijuana coming from Grainger's van on October 23, 2017, and on October 27, 2017, when he smelled marijuana on the individuals when they were asked to submit to the drug test. The Union organizing campaign played no role in his decision. Andres went on to say that he had no reason to believe any one of the employees was involved in the campaign. McCawley and Hunley testified similarly on that point. (Tr., pp. 146-148, 264-265, 294, 434-438, 474, 583-586; Respondent Exhibits 20, 22, 24).

F. Termination of Nathan Adams

On July 31, 2017, Nathan Adams was employed by Globe. Adams was unemployed at the time. It was his second employment with Globe. Adams was originally employed in 2015 as a welder. He quit by walking off the job after approximately six months of employment. Six months prior to his re-employment with Globe on July 31, 2017, Adams sent a text message to Andres on January 16, 2017, seeking employment. The text message read, as follows:

It's Nate Adams. I got laid off December 5 [2016]. If you ever need a welder, holler at me. Thanks and have a good day.

Adams denied any present memory of the text message, but conceded it may have been sent. Andres testified that the text message was received by him on January 16, 2017, at 1:59 p.m. Andres contacted Adams in July 2017, and he was hired thereafter. (Tr., pp. 173, 204, 207, 356-357).

When Adams was rehired by Globe he was retested by Ben Hunley for welding proficiency. Adams was recertified in TIG welding on his first attempt. It required at least four additional attempts before he was recertified by Globe in the MIG and FCAW semi-automatic welding processes. Adams was assigned to the Fabrication area as a Welder when he returned to Globe. Adams performed the same type of welding work he had performed during his first period of employment. Adams normally worked a ten-hour day, which was increased to twelve hours per day for several weeks. Adams confirmed in his testimony that Hunley spent most of his time on the Fabrication Shop floor. (Tr., pp. 182, 357-359, 573).

Within a short time after Adams was hired by Globe, approximately three weeks, Hunley came to Andres and complained that Adams was having difficulty with the MIG and FCAW semi-automatic welding processes. Andres told Hunley that Adams had been a good welder in his prior employment with Globe and to talk with Adams about his performance. That was done. Hunley's experience with Adams' performance, however, did not change. Moreover, Hunley did not experience the kinds of welding problems with his other welders as he was with Adams. Hunley continued to report to Andres about Adams' poor welding performance and his excessive rate of absenteeism, as well as his inability to come to work on time and remain the complete day. In an effort to correct the performance problem, Hunley suggested that another welder who was proficient in semi-automatic welding skills, be placed with Adams to help him improve his performance in that area. Andres accepted the suggestion and Dale Mull, a Welder, was assigned. (Tr., pp. 360-362, 574-575, 579).

In comparison to other Globe Welders, Hunley said that Adams' instances of absenteeism, tardiness and early outs were worse than any other Welder. In his words, Adams

was, “at the bottom.” He testified further that Adams’ rejection rate on the welds he produced was more than five times higher than the next highest welder rejection rate. Hunley was aware of the Welder rejection rates because of the time he was on the production floor, nearly 90 percent of his workday, and because the Checkout would regularly report to Hunley when rejections occurred and repairs were required. Adams’ productivity, according to Hunley, was also far below that of any other Globe Welder. Adams’ time in producing work with the semi-automatic process took two to three times longer than the same work would take any other Globe Welder. Adams also had problems with visual inspection of his welds before his work even made it to the Checkout. Those problems included weld fill inconsistencies and inconsistencies with root fill. These inspections were made by Hunley. All these production and attendance issues were regularly discussed by Hunley with Adams. Nothing about Adams’ performance changed. (Tr., pp. 574-577, 580).

As stated above, in an effort to help Adams improve his performance, Hunley assigned one of Globe’s better Welders, Dale Mull, to work with Adams on the semi-automatic process. They worked together for five or six days, but there was little change in Adams’ performance.⁸ He also assigned Adams more TIG welding, since Adams was able to better perform that process, but Hunley was limited in his flexibility to do that since TIG was primarily associated with socket welds and the TIG welding process was utilized on less than 20 percent of the welds produced in the plant. (Tr., pp. 580-582).

⁸ Nate Adams acknowledged that Mull worked with him but he denied that Mull was assigned by Globe to work with him. Instead, he claimed that he requested Mull’s assistance on the semi-automatic process. Adams also said he and Mull worked together for “10 minutes.” (Tr., pp. 194-195).

Hunley testified that Adams confided in him that his absenteeism issues were related to a medical issue for which Suboxone, an opiate blocker, was prescribed. Despite his testimony to the contrary, Adams never presented Hunley with any physician's excuse slips or any note from a treating physician. Such excuse slips are required under the Globe attendance policy. Adams also gave numerous excuses for his tardiness and early outs but Adams never produced any verification for his need to be tardy or to leave work early. These instances of work performance problems, absenteeism, tardiness and early outs were reported to Andres by Hunley at least bi-weekly beginning with Adams' fourth week of employment. (Tr., pp. 578-580; Charging Party Exhibit 14).

Adams admitted that he received verbal warnings about the problems with his semi-automatic welding a "couple of times." He also acknowledged that he discussed with Hunley his need to be absent from work. He even told Hunley he had "issues" for which he needed to see a doctor. He testified that he never revealed to Hunley what those "issues" were. He maintained the "issues" were "private." Yet, it was Adams' further testimony that he brought in physician statements for the time he was absent due to health issues, which statements Hunley refused to accept, hardly a credible comment considering Adams' other testimony on that issue. (Tr., pp. 183, 188, 193-194, 198).

The event which triggered Hunley to recommend to Andres that Adams be discharged occurred on October 13, 2017. On that occasion, Adams had been working on a piece of pipe for six hours, which Hunley thought should have been completed in an hour. Adams also left early from work that day. Hunley reported the incident to Andres and recommended that Adams be discharged. Hunley told Andres:

Look, I can't do anything else with him [Adams]. Something needs to happen. I've tried. I've put Dale [Mull] with him. I've tried to put him on socket welds to improve his performance and it's just not working out."

It was at that point Andres elected to terminate Adams' employment. A termination report was completed on October 20, 2017, and a final paycheck for Adams was prepared. Andres met with Adams, told him he was a good TIG welder, thanked him for coming back to Globe and told him it was not working out. Adams responded, "Thanks for giving me another shot," shook hands with Andres and left. Nothing was said about a union organizing campaign and Andres had no knowledge of Adams participating in a union organizing campaign. (Tr., pp. 362-365, 582-583).

G. Performance/Productivity Summaries

Respondent Exhibit 15 documents the number of accepted and rejected welds completed by Globe employees, as well as each employee's rejection rate percentage. Rejection rate is one method by which Globe measures the productivity of its Welders. The first page of Respondent Exhibit 15, **Summary Report Hartford Quality Assurance RADIOGRAPHIC INSPECTION REPORTS January 1, 2017 - October 31, 2017** (the "Summary Report"), measures the rejection rate percentage for only those nine (9) Globe welders who worked the entire period of time that was worked by Adams. The Summary Report supports the testimony of Andres and Hunley that Adams had a weld rejection rate higher than any other Globe welder. In fact, the Summary Report shows that Adams' weld rejection rate of 14.75%, created over his period of employment with Globe, exceeded the average weld rejection rate of all Globe Welders by a factor of 8.25 for the ten-month period measured. Adams' weld rejection rate exceeded the weld rejection rate of the next highest welder's rejection rate by a factor of 3.34. The Summary

Report was compiled from the original radiographic inspection reports produced and maintained by Hartford Quality Assurance, copies of which were provided to Counsel for the General Counsel and Counsel for Charging Party (Tr., pp. 393-397; Respondent Exhibit 15).

The second page of Respondent Exhibit 15 measures the rejection rate percentage for all 13 Globe Welders who worked at any time during Adams' term of employment. That page of Respondent Exhibit 15 shows that the average rejection rate of Adams exceeded the average rejection rate of all Globe Welders for the period of time measured by a factor of 7.375. (Tr., pp. 397-399; Respondent Exhibit 15).

The Summary Report, Respondent Exhibit 16, includes statistical information taken from each customer production package that was begun and completed during Adams' period of employment on which Adams participated; forty-six (46) production packages in total. A computer program called "Acorn Pipe" is utilized by Globe to track productivity. Calculations performed by that program were used to create Respondent Exhibit 16. As Andres testified, the information in Respondent Exhibit 16 is compiled from "all the drawings, the packages, the isometric drawings, the spools that were being welded on during the period of time that Nathan Adams was there. The ones that were issued to the shop as well as completed." (Tr., pp. 401-403).

The first column on Respondent Exhibit 16 identifies by stencil number the Welders who participated on the packages used to compile the Exhibit.⁹ The second column on the Exhibit identifies the diameter inches produced by each welder participating in the

⁹ The names of each Globe Welder whose stencil number appears on Respondent Exhibits 15 and 16 were provided to Counsel for General Counsel and Counsel for Charging Party. The Welder names and corresponding stencil numbers are set forth on Charging Party Exhibit 3.

production of the packages. The third column of the Exhibit shows the product of diameter inches multiplied by π (3.14) to calculate the total weld inches produced by each participating welder. The fourth column sets forth the total welds produced by each welder on the packages analyzed. The fifth column is the quotient of diameter inches divided by the total welds for each welder for all the completed packages, which yields the average weld diameter. Adams' stencil number, K1, and statistical information for the completed welded packages on which Adams worked during his employment are shown in red ink. (Tr., pp. 401-405; Respondent Exhibit 16).

The first column and the last three columns of Respondent Exhibit 16 provide the most significant comparison of productivity. Adams' total of 2,233 weld inches for all packages completed during his period of employment is 51 percent less than the 4,414 Average Weld Inches of all welders. Adams' weld inches of 2,233 is 37 percent less than the next lowest producing welder, B1, for the completed packages, whose total weld inches was 3,538. Adams' weld inches of 2,233 is 61 percent less than the most productive welder, H1, for the completed packages, whose total weld inches was 5,790. (Tr., p. 415; Respondent Exhibit 16).

The testimony provided at the hearing was that a larger weld diameter typically generates a greater number of weld inches as a larger pipe is welded using a semi-automatic welding process, which is a faster process. Adams' average weld diameter was 2.4 inches. The most productive welder had an average weld diameter of 5.6 inches. However, the two welders who had lower average weld diameters than Adams, B1 and J1, generated far greater productivity than Adams. B1's total weld inches, as noted above, was 37 percent greater than Adams' and J1's total weld inches was 39 percent greater than Adams' total weld inches. (Tr., pp. 415-421).

Andres testified that the Summary Reports, Respondent Exhibits 15 and 16, confirmed that the complaints he received from Hunley that Adams was not producing quality welds and that he was not productive in his work, were entirely accurate. The Summary Report showing total inches welded on the completed packages identifies how productive a welder is compared to other welders working on the same packages. The summaries were prepared from data that was computer generated from Globe's Acorn Pipe program. The information fed into the Acorn Pipe program, a computer aided design (CAD) system used to prepare the isometric drawings, was handled by Globe's Quality Central personnel. As Andres stated, once the schematic information for a package is fed into the program, Acorn Pipe may thereafter be accessed and used to generate specific, discreet information from the data in the computer, which was used to prepare a particular package schematic. (Tr., pp. 399-400, 416-417, 419-421).

The Checkout notes the weld stencil number and the identifying information of the welder for each weld produced on a package. This occurs during the course of the production of the package. The information prepared by the Checkout is given to the Quality Control personnel, who enter the weld information into the computer for that package. The weld/welder information then becomes part of the schematic. (Tr., pp. 413-416; Respondent Exhibit 16).

In response to Respondent Exhibits 15 and 16, Counsel for the General Counsel introduced General Counsel Exhibit 20, and Counsel for Charging Party introduced Charging Party Exhibits 4A, 4B, 5A, 5B, 6A, 6B, 7, 8, 9 and 10, to show that on the specific packages used to prepare the Summaries, there were discrepancies between what the computer-generated information showed and what Counsel for the General Counsel's hand-calculated exhibits of

randomly selected package schematics showed. In each instance, the discrepancies were immaterial as far as the information Respondent Exhibits 15 and 16 was concerned. None of those discrepancies refute the fact that Adams was the least productive and most error prone Welder in Globe's employ during his employment. (Tr., pp. 487-489, 514-516, 519-522).

In a disingenuous attempt to discredit the disciplinary action taken by Andres against Adams, Counsel for Charging Party referred to Charging Party Exhibit 3 and asked Andres why Amos Calloway was retained by Globe as a Welder when he had 19 rejected welds versus Adams' nine rejected welds. Counsel for Charging Party made the same disingenuous suggestion about Globe's retention of Rick Purtlebaugh, who had eight rejected welds. That question was answered by Andres when he noted that the 19 rejected welds for Calloway were in relation to his 411 acceptable welds, for a weld rejection rate of 4.42 percent and the eight rejected welds for Purtlebaugh were in relation to his 238 acceptable welds, for a weld rejection rate of 3.25 percent. Adams' 9 rejected welds were in relation to his 52 acceptable welds, for a weld rejection rate of 14.75 percent. Adams' weld rejection rate exceeded that of Calloway by a factor of 3 and exceeded that of Purtlebaugh by a factor of 3.5. That was why Adams was discharged and Calloway and Purtlebaugh were retained. (Tr., pp. 509-512, 539-541).

Counsel for Charging Party also noted, in reference to several of the schematics which had been used in the preparation of hearing exhibits, that welds produced by Adams appeared on Hartford x-ray reports which were generated after Adams' discharge. The issue was raised to cast doubt on the reliability of the integrity of welder stencils. Andres explained that when a weld is completed it is taken out of the fabrication area. When the spool is completed, the schematic drawing is finalized. It is only then that the spool is taken to Checkout. There are

multiple dates for welds produced by different welders on the same spool. Andres added that there can be significant time gaps between welds because of various reasons that would delay the production process. Andres testified that a welded piece could sit “for weeks or months” waiting further processing. The date of the x-ray report had nothing to do with the date of the weld in the x-ray report, or the integrity of the utilization of the stencil. (Tr., pp. 522-525, 530-531, 541-545; Charging Party Exhibits 11 and 12).

Both Respondent Exhibits 15 and 16 were admitted over objections from Counsel for the General Counsel and Counsel for Charging Party. The Administrative Law Judge noted that the objections went to the issue of weight to be given the Exhibit and not to the issue of their admissibility. In that regard, the Court further noted that Respondent Exhibits 15 and 16 were fully compliant with the requirements of Federal Rule of Evidence, Section 1006. (Tr., pp. 396-397, 415).

H. Attendance Summary

Respondent Exhibit 17 is a summary of the time lost by Adams during his term of employment measured by the summary. As the testimony showed, Globe employees fill out timecards on a daily basis identifying work performed during the day and the time spent on the particular production package(s) on which the Welder worked. Hunley uses the timecards from the production employees to enter the time into a computer spreadsheet which becomes Globe’s permanent attendance record for each employee. The time is maintained in this fashion for purposes of accuracy of payment to the employees, who are paid by direct deposit. Globe also uses the time entries to determine if a particular customer project was profitable. Customers are billed based on hours worked on their particular project(s). (Tr., pp. 366-369).

The handwritten cards from the employees are retained by Globe for a period of three weeks. This is done to help Globe and the employees resolve any pay discrepancy or worked time issues that could arise between the employee and Globe. Thereafter, the handwritten cards are discarded and the computer records remain the permanent and official Globe attendance records. Globe production employees have a weekly direct deposit of their wages. (Tr., pp. 368-369).

The attendance records for Adams were handled consistent with Globe's normal business practices. The handwritten attendance cards for Adams were prepared, retained and discarded consistent with Globe's normal business practices. The source documents from which Respondent Exhibit 17 was produced were provided voluntarily to Counsel for the General Counsel and Counsel for Charging Party. The Attendance Summary documents the exact hours and days worked by Adams and the hours and days missed by Adams. The attendance records for Adams never were subpoenaed by either Counsel for the General Counsel or Counsel for Charging Party.¹⁰ (Tr., 370-373, 387-389).

With respect to Respondent Exhibit 17, the total hours available for Adams to work were calculated based on other Welders working the same daily schedule as Adams and performing the same work as Adams. Those hours and days are noted on Respondent Exhibit 17 and total 672 available hours. The hours and days when Adams left early or was absent for the entire day are noted on Respondent Exhibit 17 and total 104.50 hours. The percentage rate of absenteeism generated by Adams during his employment missed from July 31, 2017 to October

¹⁰ Counsel for the General Counsel and Counsel for Charging Party asked that an adverse inference be drawn against Respondent for failure to maintain the handwritten timecards. The Law Judge was advised that no attendance records ever were subpoenaed and correctly advised Counsel for Charging Party that the National Labor Relations Act has no provision for record retention. (Tr., pp. 374-378, 383-384, 387-389).

17, 2017, the last day he missed work, was 15.55 percent. Adams had the worst attendance record of any Welder, or other employee working at Globe. (Tr., pp. 366-367, 376, 390-391, 574-575; Respondent Exhibit 17).

In response to a request from the Administrative Law Judge regarding the basis on which the hours per day missed by Adams were calculated, the attendance source documents for July 31, 2017, and August 3, 2017, were introduced into evidence and received as part of Respondent Exhibit 17. Andres testified that Adams was working the same number of hours per day as Amos Calloway, James Knight and Luis Martinez, each of whom was on a daily twelve-hour schedule. The attendance records for those individuals showed that they worked twelve-hour days. The records further showed that on the two days covered in the supplemental exhibits, Adams missed ten of his scheduled twelve hours on July 31, 2017, and twelve of his scheduled twelve hours on August 3, 2017. (Tr., pp. 376-386; Respondent Exhibit 17).

I. Threats of Plant Closure

Three different employees accused Hunley of having made comments to the effect that if a union were to come into the Globe facility, the plant would be closed or that the Pekin facility was built to be non-union.

One occasion was that mentioned by Adams. He claimed that Hunley walked up to him when he was talking to two other employees, "Andrew and Andrew," about union pay scales. Hunley told the employees he had been in the union and that "money is not everything." Hunley, according to Adams, went on to say that Marlin Andres would close the shop if employees tried to bring in a union. Adams claimed that this part of the conversation occurred after the two "Andrews" left. It was just Adams who was present. This exchange supposedly

took place on the plant floor at the fit-up table on or about August 20, 2017. (Tr., pp. 178-179, 200-203).

Hunley denied that he ever made a threat of plant closure to any employee. He also denied that he made any representation that the Pekin facility was built to be non-union. He was open about the fact that he had been a member of Local 440 of the Union and told employees that his experience with the Union had been positive. (Tr., pp. 589-592).

The comment about the non-union status of the Globe facility was attributed to Hunley as well by Ralph Davis in a conversation he supposedly had with Hunley. According to Davis, Hunley said the Globe plant was built to be non-union and Marlin would close it down before it would ever be union. Rodney Grainger was talking to Davis when the comment was made. Nothing further was said by Hunley and no other employees were present. By Davis' account, they were in the "fit" table area after the morning break on or about June 30, 2017. It was on that day the top page of General Counsel Exhibit 14 was distributed by the Union. That was the only time Davis ever heard Hunley say anything about the Union. (Tr., pp. 283-285, 303-304; General Counsel Exhibit 14).

Robbins also claimed that Hunley said to him, in the presence of a Fitter, "Jason," that if the union came in "they'd shut the doors." In his Board affidavit of November 3, 2017, Robbins swore under oath to the following, which directly contradicted his testimony:

I never heard Ben (the Foreman) or Houston (the Project Manager and the owner's son) say anything about the Union while I worked there.

(Tr., pp. 243-248).

J. Interrogation of Job Applicant

Robbins also testified that he was questioned about his union sympathies at the time he applied for employment at Globe. Robbins was interviewed for a Fitter position by Andres. The sum total of the alleged interrogation was described by Robbins as follows:

[. . .] But as the conversation went on, he had, you know, mentioned, “Are you Union,” and I said, “No, I am not.” And then the conversation went on, and then we continued to talk about the job and then he told me that I could start, you know, Monday, the following Monday which would have been the 9th of October.

(Tr., p. 223).

Contrary to the testimony of Robbins, Andres did not directly ask Robbins about his Union membership. As Andres testified, he asked Robbins during his interview who had referred him to Globe Industries. Robbins indicated that he had been referred by a friend at Globe Mechanical, which is a unionized shop. His membership in the Union did not interfere with his employment at Globe. (Tr., pp. 134-135).

K. Sherry Cress

Cress is employed at Globe in the position of Office Manager. She has held that position since September 21, 2015. Her job duties are best described as clerical and include answering phone calls, greeting visitors, entering information into Globe’s payroll system, addressing packing lists and bills of lading, and completing various forms based upon information provided to her by supervisory employees. Cress is stationed at the reception desk for Globe Industries, located in the same trailer as Andres’ office. She reports to and receives direction from Andres. (Tr., pp. 117-119, 550-567).

Cress is not a supervisor and has no authority to change the procedures of Globe. If the completion of her job duties necessitates any significant decisions concerning Globe, she is required to receive direction from either Andres or Marlin Andres. (Tr., pp. 341-342, 551-567).

Cress also is limited in her involvement in the hiring of new employees at Globe. Her sole responsibility is to provide interested persons with job applications and to collect those applications for review by Andres. She has no authority to hire employees and no input in the consideration of applicants. (Tr., pp. 341-342, 556-557).

i. Conversation with Union Organizers

General Counsel's allegations concerning Sherry Cress center on the interactions between Cress, Rouse, and another union organizer, Paul Williamson, on September 19, 2017. (Consolidated Complaint, ¶ 5(c)). On that date, Rouse and Williamson arrived at Globe and entered the trailer where Andres maintains his office. At the entrance to the trailer is the reception area where Sherry Cress is located. (Tr., pp. 550-567).

Rouse and Williamson requested job applications from Cress, which she provided to them. Unbeknownst to Cress, Rouse recorded their conversation. Rouse commented that both he and Williamson were union members. Cress indicated to them that the employees at Globe Industries were not represented by a union, but that Globe Mechanical had a facility in New Albany where the employees were represented by a union. Cress did not make any statement suggesting that she was involved in the hiring process, or that she had any authority to speak for Globe concerning hiring. (Tr., p. 311; General Counsel Exhibit 22).

Rouse later returned the applications to Cress. Cress collected those applications and turned them over to Andres for his consideration, as is her normal practice. When Rouse

called a few days later concerning his application, Cress informed him that she had passed the applications on to Andres for his review. She did not discuss the application with Andres or participate in any meeting where the applications were discussed. Cress had no further interactions with Rouse or Williamson. (Tr., pp. 312, 556-559).

III. ARGUMENT

A. Evidentiary Issues

As a preliminary matter, Globe will address several evidentiary issues that were raised at the hearing. A great deal of time was spent addressing the objections of the General Counsel and the Union to the admission of Respondent Exhibits 15, 16, and 17. While the Administrative Law Judge correctly admitted all three exhibits, Globe anticipates that both the General Counsel and the Union will raise additional objections in their respective briefs. Before Globe addresses the substance of the General Counsel's claims, Globe will discuss the admission of those summary exhibits.

i. Time Record Summary Argument

During the hearing, Globe produced a summary entitled "Time Lost by Nate Adams," documenting Adams' excessive absenteeism. (Respondent Exhibit 17). This summary was compiled from the spreadsheet in which Globe records and tracks all hours worked by its employees. The information contained in that spreadsheet is logged in by Hunley and based on handwritten time cards completed by each employee. The handwritten cards are maintained by Globe for a period of three weeks so that any potential disparities between the time recorded and the wages paid can be addressed. The General Counsel and the Union objected to the admission of Exhibit 17 primarily on the basis that Globe had not maintained the handwritten time cards.

Under Federal Rule of Evidence 1006, a party “may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court” so long as the underlying documents are made available to the other parties. As outlined by the Administrative Law Judge, there are additional criteria that are applied when considering the admission of a summary exhibit:

A proponent of a summary of evidence must properly authenticate it by satisfying four requirements. First, the summarized writings must be so voluminous so as to be unable to be conveniently examined in court. Second, the underlying evidence must itself be admissible. Third, the original or copies of the summarized writings must be made available to the opposing party. And, fourth, the proposed summary (or chart or calculation) must accurately summarize (or reflect) the underlying document(s) and only the underlying document(s)

AFD Fund v. United States, 61 Fed. Cl. 540, 546 (2004) (internal citations omitted).

Here, the admission of Respondent Exhibit 17 prevented the necessity of reviewing approximately three months of daily time schedules recorded in the spreadsheet. Second, the underlying document utilized to create the summary exhibit, the spreadsheet, was created during the normal course of business as part of Globe’s timekeeping system and was admissible on its own. Prior to the hearing, Respondent produced printed copies of the spreadsheet covering the period of July 31, 2017, to October 20, 2017, which includes the period during which Adams was employed by Globe. The summary reflects the information contained in the underlying documents. The General Counsel and the Union presented no evidence establishing that Respondent Exhibit 17 did not accurately reflect the contents of the produced spreadsheets.

The General Counsel and the Union take issue with the fact that the handwritten time cards completed by Adams were not retained, including a small number of time cards created after the issuance of the unfair labor practice charge (25-CA-209095) on October 31, 2017. In particular, counsel for the Union attempted to claim that there was an issue of spoliation. However, as the Administrative Law Judge correctly asserted at the hearing “it’s not that litigation holds preservation of evidence in NLRB proceedings.” (Tr., pp. 388-389). Spoliation is not addressed in any section of the NLRB Rules and Regulations, and it is not a valid basis for objecting to the admission of Respondent Exhibit 17.

Globe was not placed on notice that the General Counsel wanted to review its time records until February 2018. The Complaint in this matter was not issued until January 30, 2018. No request for preservation of evidence was made by the General Counsel, and the General Counsel did not issue its first subpoena until February 14, 2018. Respondent produced all records in its possession that were responsive to that subpoena and voluntarily included copies of the aforementioned spreadsheet, which were not subpoenaed.

The time cards were discarded in the routine course of Respondent’s business. (Tr., p. 369). As explained above, all of the handwritten time cards completed by employees are transferred to the daily spreadsheets maintained by Globe and then, after a period of three weeks, those documents are discarded. The time cards completed by Adams were treated in exactly the same manner as the cards completed by every other Globe employee. Adams’ employment was terminated on October 20, 2017, and all of his time cards were discarded by mid-November, two months before the issuance of the Complaint. The uncontroverted fact is that the information

contained on those time cards was entered into the daily spreadsheets, copies of which were provided to the General Counsel.

There was no testimony from Adams concerning any inaccuracies contained in Respondent Exhibit 17 that he was not paid an amount corresponding to the hours he worked at Globe. Each employee was responsible for completing his own time cards and their wages were based upon this information. Adams, like every other employee at Globe, had an opportunity to dispute the accuracy of the hours worked and wages paid before Globe disposed of the handwritten time cards. That is the purpose of retaining the time cards for the three week period. No evidence was presented that Adams ever disputed that his hours worked were incorrectly recorded in the spreadsheet.

At the hearing, the Administrative Law Judge rejected the objections made by Counsel for the General Counsel and the Union concerning the relevancy of the Exhibit, restricting the issue to a matter of how much weight the Administrative Law Judge should assign to the exhibit. Given the production of the spreadsheets and the lack of evidence concerning any inaccuracies in the spreadsheets, neither the Union nor the General Counsel was prejudiced by the unavailability of the handwritten time cards. *See Queen of the Valley Med. Ctr.*, 2018 N.L.R.B. LEXIS 111, *201 (N.L.R.B. February 28, 2018). Exhibit 17 remains a practical summarization of Adams' absences, and reinforcement of the opinion of Hunley concerning Adams' excessive absenteeism, an opinion he shared with Andres, and which ultimately was a substantial factor in the termination of Adams' employment.

ii. Productivity Summaries

At the hearing, Globe introduced two additional summary exhibits which detailed the productivity of the Welders at Globe, Respondent Exhibits 15 and 16. Respondent Exhibit 15 details the number of accepted and rejected welds completed by Globe employees, as well as the overall rejection rates for the Welders who were active for any time during Adams' period of employment. Respondent Exhibit 16 is a related summary report, which includes the total number of inches welded by each Welder at Globe. Both summary exhibits record information concerning the method by which Globe assessed the productivity of each of its Welders. The data for these Exhibits was provided by quality assurance personnel at Globe and all calculations were performed using the Acorn Pipe software program.

The General Counsel and the Union challenged both the admissibility and the accuracy of Respondent Exhibits 15 and 16. The Administrative Law Judge admitted the exhibits over those objections, allowing the General Counsel and the Union to submit their own exhibits concerning the calculations. Contrary to the positions of the General Counsel and the Union, Respondent Exhibits 15 and 16 are both admissible and provide relevant information concerning Adams' lack of productivity.

As cited above in the discussion concerning Respondent Exhibit 17, there are four factors that the Administrative Law Judge should consider in determining admissibility under Federal Rule of Evidence 1006: voluminous underlying records; admissibility of underlying records; availability to opposing party; and accuracy of the summary. The admission of Respondent Exhibits 15 and 16 prevented the necessity of the Administrative Law Judge reviewing 2,796 separate Inspection Reports and 46 Inspection Packages. (Tr., p. 392). The

Inspection Reports and Packages are records kept by Globe in the usual course of business and no issue was raised concerning the admissibility of the individual Reports. Prior to the hearing, Respondent produced printed copies of the Reports and Packages covering the same period of time as the Exhibits to the General Counsel. It is only the final factor, the accuracy of the summary reports that was debated during the hearing.

Both the General Counsel and the Union submitted multiple exhibits attempting to demonstrate inaccuracies in Respondent Exhibits 15 and 16 (General Counsel Exhibit 20 and Charging Party Exhibits 3, 4a, 4b, 5a, 5b, 6a, 6b, 7, 8, 9, and 10.). As an initial matter, some of these alleged errors were a result of the way in which the Acorn program performs its calculations, including the rounding of decimal numbers. (Tr., p. 516). More importantly, the alleged errors pointed out by the General Counsel and the Union may affect the degree, but not the end result. For instance, in General Counsel Exhibit 20, the General Counsel has noted two alleged errors pertaining to Adams (“K1”) across four Packages. For Package 17-004-C7, the diameter-inches are marked as 26.5 rather than 28.8 and in Package 17-196-C2, the diameter-inches are marked as 34.75 rather than 38.5. This difference is insignificant, as it would at most alter the average weld diameter calculation by .02 and would have no effect on either the total number of weld inches or total numbers of welds completed by Adams.

As to the multiple exhibits introduced by the Union, half of the exhibits showed no errors concerning the calculation of Adams’ productivity, or noted only that the program rounded a particular number. At least one of the alleged errors, Charging Party Exhibit 9, favored Adams, showing a greater amount of weld inches. Without littering this brief with

mathematical formulae, Respondent states that adjusting for those alleged errors would not have materially altered the end calculations.

Though a substantial amount of time was spent at the hearing concerning these exhibits, none of the evidence presented changes the informative value of Respondent Exhibits 15 and 16. The purpose of introducing these Exhibits was to support the determination of Globe that Adams' productivity fell below its acceptable standards. As Andres explained, Adams completed less than half of the number of welds as the next least productive Welder ("J1") over the same period of time. (Tr. pp. 416-417). Whether Adams was a very poor welder or an extremely poor welder does not impact that determination. Contrary to the claims of the General Counsel, it was Adams' excessive absenteeism and lack of productivity, rather than any Union sympathies that Adams may have held, that led to the termination of his employment.

B. Globe Did Not Discriminate Against Claimants

i. Standard

To prove that an employer has violated Sections 8(a)(1) and (3), the General Counsel must demonstrate that the alleged actions of the employer were motivated by union animus. *See Temp-Masters, Inc. v. NLRB*, 460 F.3d 684, 689 (6th Cir. 2006). In so doing, the General Counsel must show that "(i) an individual was engaged in protected activity, (ii) the employer was aware of the protected activity, and (iii) that the employee's protected activity motivated the adverse treatment." *Id.* (quoting *Kentucky General, Inc. v. NLRB*, 177 F.3d 430, 435 (6th Cir. 1999)).

In this case, the General Counsel has alleged that Respondent terminated the employment of Nathan Adams, Ralph Davis, and Dale Robbins "because the named employees

of Respondent formed, joined, and assisted the Charging Party and engaged in concerted activities and to discourage employees from engaging in these activities,” in violation of Section 8(a)(1) and (3) of the Act. (Consolidated Complaint, ¶ 6(c)). That claim was later amended to include an allegation that Respondent violated the Act by “requir[ing] its employees Ralph Davis and Dale Robbins to take a drug test.” (*Id.* at ¶ 6(b)). Because the General Counsel has failed to offer convincing proof that either the required drug testing of Davis and Robbins or the termination of the employment of Adams, Davis, and Robbins were in any way discriminatory, it has failed to meet its burden. As such, the Complaint of the General Counsel must be dismissed.

ii. Union Activities Were Not a Motivating Factor

Neither the requirement that Davis and Adams submit to a drug test, nor the terminations of the employment of Adams, Davis, and Robbins, were related to any pro-Union activities in which the alleged discriminatees may have engaged as the General Counsel has alleged. Globe was unaware that Adams, Davis, or Robbins supported the Union, or that they were involved in any effort to unionize Globe. Adams was discharged because of a lack of productivity and excessive absenteeism. Robbins and Davis were required to take a drug test based upon a reasonable suspicion that they were under the influence of marijuana while working, and ultimately were discharged based on those suspicions and for admitting to Andres on October 27, 2017, that they would not pass the required drug test.

a. Concealment of Union Activities

There was extensive testimony concerning the efforts of Adams, Robbins and Davis to conceal their involvement in the Union from management at Globe Industries. The three alleged discriminatees testified that they did not display Union paraphernalia, that they only

spoke to Globe employees who they believed already supported the Union, and they went to great lengths to ensure that neither Andres nor Hunley became aware that they either supported the Union, or that they were soliciting employees to support the Union. (Tr., pp. 190-192, 198-199, 218, 224-225, and 282, 289-290, 300-302).

Union Organizer Kurek corroborated the testimony of Adams, Robbins and Davis that they and the Union were trying to keep information regarding the Union's organizing effort quiet and secretive from Globe management. As Kurek testified, no employees of Globe were ever asked by the Union to engage in handbilling at the Company's property and no employees of Globe ever engaged in any Union activity in the presence of Andres or Hunley, or any other Globe supervisor or agent. Kurek stated that none of the three employees who attended the October 18, 2017, meeting in Scottsburg were given Union paraphernalia, such as union stickers, buttons, insignia, wearing apparel or any other item that would identify them as being a Union supporter.

The testimony concerning the efforts of both the Union and the alleged discriminatees to conceal their pro-Union activities significantly undermines the claim of the General Counsel that Globe was motivated to take adverse employment actions against Adams, Robbins and Davis based upon their affiliation with the Union. Further, any reliance upon the small plant doctrine to prove Respondent's knowledge of those employees' pro-union stance is inappropriate. *Gold Coast Rest. Corp. dba Bryant & Cooper Steakhouse*, 304 N.L.R.B. 750, enforced, *Gold Cost Restaurant Crop. v. NLRB*, 995 F.2d 257 (D.C. Cir. 1993) (small-plant doctrine inappropriate where employee successfully kept union activity secret).

b. Lack of Knowledge of Union Activities

The effort to keep any pro-Union activities by Globe employees a secret was successful. Andres testified at length that he had no knowledge of any employees at Globe supporting the Union. Andres did not hear any employees express such support, see any employees wearing visible signs of Union support, or have anyone report any efforts by employees to organize Globe Industries (Tr., pp. 354-356).

As with Andres, Hunley had no knowledge of the discharged employees being involved in pro-Union activities. Hunley's testimony is especially salient as he, in his position as Shop Foreman, spent virtually all of his workday on the plant floor alongside his fellow employees. (Tr., pp. 569, 583-584, 589-590).

The testimony of Andres and Hunley is supported by the testimony of Union Organizer Kurek. As of October 18, 2017, no effort had been made by any Union Organizer or Globe employee to obtain union authorization cards from a Globe employee nor had any authorization cards or contact cards been distributed to Globe employees. Moreover, the Union had made no effort to advise Globe management which, if any, employees were involved in the Union's organizing effort at Globe.

c. No Anti-Union Animus

Apart from a lack of knowledge of any pro-Union activities engaged in by Adams, Robbins, and Davis, Andres bore no animus toward the Union. Andres allowed Kurek and Mareno to leaflet vehicles at the Globe parking area and engaged in friendly conversation with them. (Transcript, pp. 346-354). At no time during the employment of the alleged

discriminatees did Andres or any other employee of Globe interfere with efforts to campaign at Globe.

d. Globe Had Reasonable, Non-Discriminatory Bases for Taking
Adverse Employment Actions Against Adams, Robbins and Davis.

Assuming arguendo that the General Counsel has met its initial evidentiary burden of proving anti-Union animus, which Globe disputes, Globe has provided reasonable, non-discriminatory bases for the actions it took against Adams, Robbins, and Davis. *Wright Line*, 251 N.L.R.B. 1083, 1089 (1980) (“If the General Counsel meets its initial evidentiary burden, the burden of persuasion “shift[s] to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.”).

1. Termination of Adams’ Employment

As to Adams, lengthy testimony and supporting documentation were presented by Globe witnesses concerning the reasons for his termination from employment. Adams was the least productive welder at Globe and his frequent absences reached an intolerable level. Both issues are borne out by the data collected by Globe as summarized in Respondent Exhibits 15, 16, and 17. While the General Counsel and the Union argued at length concerning the admissibility and relevance of these Exhibits, the substantive issue in this case is whether Andres’ decision to terminate Adams’ employment was based on the reasons stated:

In order to meet its burden under *Wright Line* (i.e., to show that it would have discharged the employee even in the absence of protected activity), an employer need not prove that the employee committed the alleged offense. However, the employer must show that it had a reasonable belief that the employee committed the offense, and that it acted on that belief when it discharged him. *See Yuker Construction*, 335 NLRB 1072 (2001) (discharge of employee based on mistaken belief does not constitute unfair labor practice, as employer may discharge an employee for any reason, whether or not it is just, so long as it is not for protected activity);

Affiliated Foods, 328 NLRB 1107, 1107 and fn. 1 (1999) (it was not necessary for employer to prove that misconduct actually occurred to meet burden and show that it would have discharged employees regardless of their protected activities; demonstrating reasonable, good-faith belief that employees had engaged in misconduct was sufficient); and *GHR Energy*, 294 NLRB 1011, 1012-1013 (1989) (respondent met *Wright Line* burden by showing that employees would have been suspended even in the absence of their protected activities, because respondent reasonably believed they had engaged in serious misconduct endangering other employees and the plant itself).

McKesson Drug Co., 337 N.L.R.B. 935 n.7 (2002). Here, there was clear and un rebutted testimony that Hunley reported to Andres about Adams' poor welding performance and his excessive rate of absenteeism, as well as his inability to come to work on time and remain the complete day. Hunley presented these concerns to Andres throughout the duration of Adams' employment. Though Hunley did not issue written disciplinary warnings to Adams, Hunley regularly counseled Adams concerning both his attendance and his work performance, going so far as to assign a more experienced Welder to coach Adams. In doing so, Hunley focused on rehabilitating the work performance of Adams, rather than disciplining Adams. When it became apparent that none of Hunley's efforts had succeeded, Hunley recommended to Andres that Adams be discharged. Andres agreed and a termination report was completed on October 20, 2017. At the time Adams was terminated from employment, no mention was, or had been, made about a union organizing campaign.

Adams was not assessed differently from any of the other welders at Globe. As laid out above, Adams was the most error-prone Welder at Globe with a rejection rate that exceeded the average weld rejection rate of all Globe Welders by a factor of 8.25 for the ten-month period measured. (Respondent Exhibit 15). The Union attempted to make a false

comparison between Adams and two other Globe Welders, Calloway and Purtlebaugh, based on the number of rejected welds for each welder, rather than each welder's rejection rate. An honest assessment of each Welder's productivity based on a ratio of errors to welds, however, demonstrates that Adams generated significantly more errors on significantly fewer welds.

The evidence presented by Globe is more than enough to substantiate its stated reasons for discharging Adams, namely his lack of productivity and excessive absenteeism.

2. The Termination of the Employment of Robbins and Davis and the Required Drug Tests

Robbins and Davis were discharged under the application of a neutral Globe policy. The Drug Policy is included in the Globe Handbook. It also is published as a stand-alone policy that is given to each new Globe employee at the time of employment. Each alleged discriminatee signed a receipt acknowledging their receipt of a copy of that policy and a separate receipt acknowledging their receipt of a copy of the Globe Handbooks. (Respondent Exhibits 3, 4, 8, and 9). There is no question that Robbins and Davis were both informed and aware of the Drug Policy.

Robbins and Davis were required to submit to a drug test based upon a reasonable suspicion that they were under the influence of marijuana during the workday. Hunley testified as to why he believed that Davis, Robbins, Adams, and Grainger used marijuana during the work day, and his safety concerns over having any Globe employees operating equipment while impaired. His concerns about drug use and injuries only increased over time. Hunley reported this behavior numerous times to Andres.

Hunley attempted to resolve the issue prior to taking disciplinary action by telling those four employees that he could smell marijuana on them when they returned from breaks and

lunch. Notwithstanding this cautionary notice, nothing changed about their behavior. This testimony was not rebutted or otherwise contradicted at the hearing. Hunley did not issue written discipline concerning the suspected use of marijuana, his efforts being more focused on addressing the safety concerns raised by impaired employees rather than discharging or terminating those employees.

Only after it was clear that discipline was required to curb the use of drugs at the Pekin facility did Andres make the decision to have Davis, Robbins and Grainger tested under the policy's reasonable suspicion standard. Andres, accompanied by a non-supervisory employee, McCawley, informed Davis, Robbins and Grainger that the Company drug policy gave him the right to test for reasonable cause. Each employee was given an opportunity to comply with the required testing. Rather than submitting to the drug test, Grainger and Davis admitted that they would test positive and refused to submit to the test. Robbins did not say anything, but nodded in agreement that he too would not pass the required drug test. All three individuals refused to go with Andres to the Norton Occupational Health Center to take the drug test. All three executed the Drug Test Refusal Form. All of these events were witnessed and confirmed at the hearing by a non-supervisory employee, McCawley. McCawley also testified that he detected the odor of marijuana emanating from Grainger's van immediately before Andres gathered the three employees to inform them of the required drug test.

Grainger, Robbins, and Davis were suspended and later discharged. Despite being required to submit to the same drug test at the same time, and being subject to the same exact discipline, as Robbins and Davis, Grainger is not named in the Consolidated Complaint. Grainger, who took no part in the Union organizing at Globe, was held accountable for his

actions under the same consistent application of Globe policy as Davis and Robbins. This fact significantly undermines any claim that Robbins and Davis were discharged for their Union sympathies and reinforces that the reasons for discharge testified to by Andres were the only reasons why Robbins, Davis, **and** Grainger were terminated from their employment. *W. Irving Die Casting of Ky.*, 346 N.L.R.B. 349, 349 (2006) (Consistent discipline of employees can rebut charges of pretext). Neither the General Counsel nor the Union called Grainger as a witness.

All of the actions taken by Andres in response to the reasonable suspicion of drug use by Robbins, Davis and Grainger were handled in accordance with Globe policy. Neither Andres nor Hunley were aware of any union sympathies or support by Adams or Robbins, and Andres affirmatively stated that the Union organizing campaign played no role in his decision. Andres testified that the actual refusal to submit to the drug test, as noted in the Termination Reports, was not determinative of his decision to terminate Davis, Robbins and Grainger. Rather, Andres considered the following: 1) each individual admitted they he would fail the drug test if he took it; 2) such individuals consistently had been suspected of using marijuana at work; and 3) Andres personally smelled marijuana on the individuals when they were told to submit to the drug test. It was for these reasons, and not any concerted activities in which they may have engaged, that Robbins and Davis were discharged.

C. Globe Did Not Violate Employees Section 7 Rights

i. Threats of Plant Closure

The General Counsel alleges that Hunley threatened closure of the Pekin facility if employees “selected the Charging Party as their collective representative” on three occasions, June 29, 2017, mid-to late-August 2017 and October 2017. (Consolidated Complaint, ¶ 5(a),

5(b); Tr. p. 279). These allegations were not supported by the testimony at the hearing. The testimony presented by Robbins and Adams consistently lacked credibility, while the testimony of Robbins, Adams, and Davis was directly contradicted by Hunley.

The claim of Robbins that Hunley stated that if the union came in “they’d shut the doors,” was contradicted by his own Board affidavit given on November 3, 2017. That was not the only testimony from Robbins that was contradicted by his sworn statement to the Board. Robbins also testified at the hearing that he openly displayed pro-Union stickers, while stating in his affidavit that he did not do so. Robbins further undermined his credibility by making the patently false statement that he brought errors in his affidavit, to the attention of the Board Agent preparing the affidavit but the Board agent refused to make the corrections, thereby knowingly requiring Robbins to execute a false affidavit. The suggestion of such knowing and willful misconduct by a Board Agent is patently absurd.

According to Adams, Hunley stated that Marlin Andres would close the shop if employees tried to bring in a union. However, this alleged statement was only heard by Adams. As with Robbins, the testimony of Adams during the hearing was inconsistent and contradictory. Adams attempted to downplay the disciplinary warnings that he received from Hunley before finally admitting that he received verbal warnings about the problems with his semi-automatic welding a “couple of times.” Adams’ assertion that Mull only coached him “one time” for “ten minutes” at Adams’ request was laughable. (Tr., p. 195). Adams also gave completely unbelievable testimony saying that he tried to give physician statements to Hunley for his absences, but that Hunley refused to accept them. That testimony is absolutely untethered to reality.

In contrast, Hunley was direct and honest in his testimony. Even where a question went to an oversight on Hunley's part, such as not issuing written disciplinary warnings to Adams, Hunley made no attempt to prevaricate or give an evasive answer. He thought coaching and counseling would work. It didn't. There is no reason to believe discipline would have been more effective. As a further indicator of Hunley's forthrightness, neither the General Counsel nor counsel for the Union made an effort to rebut any of the testimony given by Hunley.

Hunley denied that he ever made a threat of plant closure to any employee or even intimated such an outcome to any employee. He also denied that he made any representation, as asserted by Davis, that the Pekin facility was built to be non-union. Further, any such statement concerning a past decision by Marlin Andres to establish the Pekin operation as a non-union facility would not constitute a violation of employees' Section 7 rights. *Stanadyne Auto. Corp.*, 345 NLRB. 85, 89 (NLRB August 24, 2005) (Finding no violation for an alleged threat of plant closure where speakers made clear that they were not making threats or predictions about the future, but rather, presenting facts and recollections about actual events.). Hunley was open about the fact that he had been a member of Local 440 of the Union and told employees that his experience with the Union had been positive. (Tr., pp. 589-592).

ii. Interrogation of Applicants

The General Counsel alleges that "[a]bout October 2, 2017, Respondent, by Andres, at Respondent's facility, interrogated job applicants about their union membership, activities, and sympathies." (Consolidated Complaint, ¶ 5(d)). Based on testimony at the hearing, the only "job applicant" who fits the allegation was Robbins. Robbins testified that

Andres asked “Are you Union?” and Robbins responded in the negative. (Tr., p. 223). No other testimony was presented concerning any alleged interrogation by Andres.

As outlined in the previous section, Robbins made a number of contradictory statements that call into question the veracity of any of his testimony. Andres denied that Robbins ever identified himself as supporting the Union at any time during his employment with Globe. Andres further testified that during the interview, he only asked Robbins who had referred him to Globe Industries. Andres never directly asked Robbins about his Union affiliation.

iii. Sherry Cress

a. Agency Argument

The General Counsel claims that “Sherry Cress held the position of Respondent’s Office Manager and has been an agent of Respondent within the meaning of Section 2(13) of the Act.” (Amended Consolidated Complaint, ¶ 4(b)). The General Counsel further takes the position that “[a]bout September 19, 2017, Respondent, by Sherry Cress, at Respondent’s facility, informed job applicants that Respondent does not hire union applicants,” an act which allegedly “interfer[ed] with, restrain[ed], and coerc[ed] employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.” (*Id.* at ¶ 5(c), 7). Respondent denies that Sherry Cress was an agent of Globe Industries, LLC, disputes that any person could reasonably believe that she had the authority to speak on behalf of Globe concerning matters of employment, and denies that any statement she made to Rouse or Williamson on September 19, 2017, was violative of the Act.

1. Cress Was Not An Agent Of Globe Industries, LLC

Cress was not an “agent” of Respondent as the term is defined under the Act. 29 U.S. Code § 152(13). In *Cornell Forge Company*, 339 N.L.R.B. 733 (2003), the NLRB stated the burden of proving an agency relationship is on the party asserting its existence. The agency relationship must be established with regard to the specific conduct alleged to be unlawful. *Pan-Oston Company*, 336 N.L.R.B. 305, 306 (2001). In *Pan-Oston*, the NLRB further “emphasize[d] that an employee may be an agent of the employer for one purpose but not another.” *Id.*

The NLRB applies the common law principles of agency when determining whether an employee is an agent of the employer. *Southern Bag Corp.*, 315 N.L.R.B. 725 (1994). Under these common law principles, a finding of agency may be based on either the actual or the apparent authority of the employee to act for the employer. *Cooper Hand Tools*, 328 N.L.R.B. 145, 145 (1999). In *Local 9431, Communications Workers of America, AFL-CIO*, 304 N.L.R.B. 446, 448 (1991), the NLRB defined how both actual and apparent agency may be created:

According to the Restatement 2d, Agency, § 7, actual authority refers to the power of an agent to act on his principal's behalf when that power is created by the principal's manifestation to him. That manifestation may be either express or implied. Apparent authority, on the other hand, results from a manifestation by a principal to a third party that another is his agent. Under this concept, an individual will be held responsible for actions of his agent when he knows or "should know" that his conduct in relation to the agent is likely to cause third parties to believe that the agent has authority to act for him. Restatement 2d, Agency, § 27. As with actual authority, apparent authority can be created either expressly or . . . by implication.

Apparent authority results from a manifestation by the principal to the third party which creates a reasonable basis for the latter to believe the principal has authorized the alleged

agent to perform the acts in question. *Southern Bag Corp.*, 315 N.L.R.B. 725; *Beaird Industries*; 311 N.L.R.B. 768 (1993); *Albertson's, Inc.*, 307 N.L.R.B. 787 (1992). The question becomes whether a person could “reasonably believe the employee in question was reflecting company policy and speaking and acting for management.” *Waterbed World*, 286 N.L.R.B. 425, 426-427 (1987); *see also Shen Automotive Dealership Group*, 321 N.L.R.B. 586, 593 (1996) (“Apparent authority is created through a manifestation by the principal to the third party that supplies a reasonable basis for the latter to believe that the principal has authorized the alleged agent to do the act in question.”) In determining whether apparent authority exists, the NLRB considers the position and duties of the employee in addition to the context in which the alleged acts occurred. *Jules V. Lane*, 262 N.L.R.B. 118, 119 (1982).

2. Sherry Cress Has No Actual Authority To Represent Globe

The General Counsel failed to present evidence that Cress had the authority to act on behalf of Globe in general, and failed in particular to prove that Cress had the authority to screen or hire potential employees. As stated above, her duties are clerical and subject to the direction of either Andres or Marlin Andres. She has no authority to make decisions on behalf of Globe without such direction, or to deviate from that direction without the approval of Andres or Marlin Andres. Both Cress and Andres offered testimony to this effect.

Seeking to demonstrate that Cress acted as a representative of Globe, the General Counsel introduced a scattershot of documents bearing her signature or name. However, these documents prove nothing more than that Cress filed or submitted information provided to her by other employees at Globe. Globe will briefly respond to each of the submitted documents:

1. Business Entity Report (General Counsel Exhibit 2). This Report is a standard business filing which all Indiana companies must file with the Indiana Secretary of State. Cress completed and filed this document based on information provided to her by Marlin Andres. The document lists Marlin Andres as the registered agent for Globe. Cress has never served as the registered agent for Globe. (Tr., pp. 565-566).

2. Indiana New Hire Reporting Center Form (General Counsel Exhibit 3). The document contains basic information about one employee, Dale Robbins. Cress is only listed as an employer contact. Completion of this document is consistent with her role as office manager, receiving and disseminating information to Andres and Hunley.

3. Unemployment Insurance Protest Form (General Counsel Exhibit 4). Again, Cress is only listed as an employer contact. As Cress testified at the hearing, she transcribed the information contained in this form from a Termination Report completed by Andres, and returned the form to the Indiana Department of Workforce Development. Cress does not conduct any independent investigation concerning the reason for the protest or the information contained on the Termination Report. Andres is the only Globe supervisor who has the authority to address any issues concerning unemployment with the Department or to make a determination as to whether Globe will appeal an adverse ruling. (Tr., pp. 554-555).

4. ACH Authorized Representative document (General Counsel Exhibit 5). This document concerns direct deposits of wages paid by Globe to its employees. Cress is listed as a “person authorized to verify ACH File deliveries.” At the bottom of the same document, Marlin Andres signed as the “Authorized Representative” for Globe. As Cress explained, her part in the payroll system is limited to a bookkeeping function. She enters the hours worked by each

employee, which are provided to her by Hunley, into Globe's payroll software. The payroll system calculates the wages owed to each employee and Cress then transfers the information into Globe's banking software so that the employees' wages are direct deposited into the appropriate account. Cress has no authority to change this information or to modify Globe's payroll practices and policies. (Tr., pp. 551-552).

5. OSHA 300 Log (General Counsel Exhibit 6). Cress signed this document providing basic information about Globe and a numeric listing of work-related injuries or illnesses. Cress indicated her position as office manager. There is no suggestion Cress did anything more than transcribe information provided to her by other Globe employees.

6. Employer's Quarterly Federal Tax Return (General Counsel Exhibit 7). Cress signed this form and indicated her title as "bookkeeper." Cress testified the information for this document was generated by Globe's payroll system and she "basically just transfer[s] the information from the software onto the paper, and then I sign it and mail it in." She does not have the authority to address any issues raised as a result of such filings; such authority rests with Andres. (Tr., pp. 552-554).

7. Assured Partners e-mail (General Counsel Exhibit 22). This is an e-mail from a Client Service Account Manager at Assured Partners to Cress. Cress testified she submits insurance applications to Assured Partners on behalf of the employees, but the employees themselves fill out the forms. She does not follow up after applications are submitted as that responsibility rests with Andres. Assured Partners only contacts Cress concerning the completion of the forms. (Tr., pp. 561-567)

Apart from her testimony concerning the above exhibits, Cress and Andres both testified Cress has no authority to commit Globe's credit and her power to purchase is limited to office supplies. While Cress completes packing lists and bills of lading on outgoing shipments, she does not provide any of the information contained in those documents. As she explained during the hearing, "I just put in the address on a bill of lading, put the job number and the date is all I do, wherever the shipment is going." (Tr., pp. 342, 550-552).

None of the documents submitted by the General Counsel serve to prove anything more than that Cress completed various routine forms on behalf of Globe, utilizing information provided to her by other employees. As Cress testified at length, she had no independent authority to bind or speak on behalf of Globe. Any substantive decision concerning the content of the filings completed by Cress was required to be submitted to either Andres or Marlin Andres. Further, none of the documents submitted speaks to the central claim of the General Counsel, namely that Cress had a role in screening or hiring applicants at Globe.

3. Rouse and Williamson Could Not have Reasonably Believed
Cress Had the Authority to Represent Globe on Issues of
Employment

Rouse and Williamson could not have "reasonably believed" Cress represented Globe concerning matters of employment. Cress was seated at the reception desk for Globe when she was approached by Rouse and Williamson on September 19, 2017. Rouse requested job applications from Cress, which she provided. Cress did not make any statement that she was involved in the hiring process, or that she had any authority to speak for Globe concerning hiring. Further, Cress made reference to an unnamed "they" when discussing the parties at Globe who made hiring decisions, clearly indicating someone other than herself made such

decisions. Rouse made no further inquiry as to what position Cress held with Globe, nor did he ask Cress which Globe employee reviewed applications. (General Counsel Exhibit 22).

It would have been evident to anyone entering the trailer at Globe that Cress was not a supervisor or owner. No part of the conversation that Rouse recorded on September 19 would alter such perception, and the impression would only have been further confirmed for Rouse by his subsequent contacts with Cress. When Rouse returned his application on September 22, Cress “told him that [she] would pass down his application.” (Tr., p. 559). Later, when Rouse called Cress to follow up on the status of his application, Cress informed him she had passed on his application to Andres for Andres to review. There is no evidence Cress, during any of the three occasions when she spoke with Rouse, made a statement or otherwise, gave the impression that she had any greater role in hiring than handing out and collecting job applications. As such, the Administrative Law Judge must reject any argument that Cress had the apparent authority to act as an agent for Respondent on matters of employment.

b. No Statement Made By Cress To Rouse or Williamson On September 19, 2017, Was Violative Of The Act

The General Counsel charges that Globe, through the statements to Rouse and Williamson made by Cress on September 19, 2017, “interfer[ed] with, restrain[ed], and coerc[ed] employees in the exercise of the rights guaranteed in Section 7 of Act in violation of Section 8(a)(1) of the Act.” (Amended Consolidated Complaint, ¶ 7).

As explained at length above, Globe denies Cress was an agent whose actions or statements may be ascribed to Globe under the Act. That being said, the exchange on September 19 between Rouse and Cress was devoid of any threatening context, or attempt at coercion. The test utilized by the NLRB is whether the employer engaged in conduct which, it may reasonably

be said, tends to interfere with the free exercise of employee rights under the Act. *See NLRB v. Illinois Tool Works*, 153 F.2d 811, 814 (7th Cir. 1996). In making the requisite determination, the NLRB considers the total context in which the challenged conduct occurs and is justified in viewing the issue from the standpoint of its impact upon the employees. *NLRB v. E.I. du Pont & Co.*, 750 F.2d 525, 528 (6th Cir. 1984). This provision is modified by Section 8(c) of the Act, which defines and implements the First Amendment right of free speech in the context of labor relations. *NLRB v. Four Winds Industries*, 53 F.2d 75 (9th Cir. 1969). Section 8(c) permits employers to express "any views, arguments or opinions" concerning union representation without running afoul of Section 8(a)(1) of the Act if the expression "contains no threat of reprisal or force or promise of benefit." *NLRB v. Marine World USA*, 611 F.2d 1274 (9th Cir. 1980); *NLRB v. Raytheon Co.*, 445 F.2d (9th Cir. 1971).

During the conversation between Rouse and Cress on September 19, 2017, Cress made two factual statements: 1) Globe Industries was a non-union facility, and 2) Globe Mechanical operated a facility in New Albany where the employees were represented by a union. These statements were made in direct response to Rouse's questions concerning whether union members were employed at Globe Industries. Further, Cress provided Rouse and Williamson with the job applications they requested and accepted their completed application when Rouse returned them a few days later. In doing so, Cress treated Rouse and Williamson in the same manner she would treat any other applicant, and without regard as to whether or not they were affiliated with a union. None of the statements made by Cress could reasonably be understood as an attempt to coerce or intimidate Rouse or Williamson.

IV. CONCLUSION

For all the foregoing reasons, it is the position of Globe Industries that it did not discriminate against Adams, Robbins, and Davis on account of their affiliation with the Union in violation of the Act. Adams was terminated from employment for his demonstrably poor work performance and his excessive absenteeism. Robbins and Davis were required to submit to a drug test based on a reasonable suspicion they were using marijuana at work on multiple occasions, including the day they were asked to submit to the drug test. They were then discharged for admitting to a clear violation of published Globe policies, that is, that they would not pass the required drug test.

Globe did not interfere with the Section 7 rights of any of its employees. Ben Hunley denied ever threatening the closure of the Pekin facility. Statements to the contrary provided by witnesses for the General Counsel, by their own testimony, brought their own credibility into question. Similarly, Andres gave testimony he never directly asked Robbins about his Union affiliation during Robbins' October 2, 2017 interview. Finally, Globe presented substantial evidence that Sherry Cress was not an agent of Globe and that Cress never coerced or intimidated any job applicants at Globe.

As such, we respectfully submit that the Amended Consolidated Complaint should be dismissed in its entirety.

Respectfully submitted,

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STATEMENT OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed electronically with the Division of Judges of the National Labor Relations Board using the Board's E-File system, and served copies by electronic message, on April 20, 2018, upon:

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